TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1311. ~~378~~ ~~559~~ 277 30

THE NEW ENGLAND MORTGAGE SECURITY COMPANY, APPELLANT,

vs.

J. F. GROVES, SHERIFF OF POLK COUNTY, OREGON, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED DECEMBER 16, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

Oregon, a bill of complaint in words and figures as follows, to wit:

United States Circuit Court for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY, Plaintiff,

vs.

J. F. GROVES, Sheriff of Polk County, Oregon; B. P. CORNELIUS Sheriff of Washington County, Oregon; Sol. King, Sheriff of Benton County, Oregon; G. A. Taylor, Sheriff of Douglas County, Oregon; J. R. Campbell, Sheriff of Lane County, Oregon; William Martin, Sheriff of Umatilla County, Oregon; J. K. Charlton, Sheriff of Linn County, Oregon; E. B. Collard, Sheriff of Yam Hill County, Oregon; A. L. Saunders, Sheriff of Union County, Oregon, Defendants.

To the judges of the circuit court of the United States for the district of Oregon:

The New England Mortgage Security Company of Windham county, State of Connecticut, and a citizen of said county of Windham and State of Connecticut, brings this its bill against J. F. Groves, sheriff of Polk county, Oregon; B. P. Cornelius, sheriff of Washington county, Oregon; Sol. King, sheriff of Benton county, Oregon; G. A. Taylor, sheriff of Douglas county, Oregon; J. R. Campbell, sheriff of Lane county, Oregon; William Martin, sheriff of Umatilla county, Oregon; J. K. Charlton, sheriff of Linn county, Oregon; E. B. Collard, sheriff of Yam Hill county, Oregon; A. L. Saunders, sheriff of Union county, Oregon, all of whom are citizens and residents of the State of Oregon.

And thereupon your orator complains and says that it is now, and during all the times hereinafter named has been, a foreign corporation, duly incorporated under and by virtue of the laws of the State of Connecticut, resident at Windham county, in said State, and with its principal business office at the city of Boston, in Massachusetts, and as such is now, and during all the times hereinafter named has been, the owner of a large number of promissory notes secured by mortgages on lands in the different counties aforesaid of said State, which said mortgages are now, and were prior to the act of the Legislature of said State, hereinafter referred to and set out, duly recorded in the records of mortgages of real estate for said several and respective counties in which said mortgaged lands are situated.

That your orator, while engaged in its lawful business and in pursuance of its powers, did make various loans of its money to persons, residents of and citizens within the State of Oregon, and in accordance with its rules and the contract of said borrowers did, on making said several loans, take evidences of indebtedness from said borrowers in the form of promissory notes for the varying amounts so loaned, which said notes were generally made payable at the office of the Corbin Banking Company in the city of New York, in the State of New York, and were in the following form and bore date

and were executed at the post-office address or place of business of said borrowers, always in said State of Oregon:

$—. ——, OREGON, ——, 18—.

Value received, on the — day of ——, 18—, I promise to pay the New England Mortgage Security Company, or order, — dollars, with interest from date until paid at — per cent. per annum, as per coupons attached, at the office of the Corbin Banking Company, New York city, New York. Unpaid interest shall bear interest at 10 per cent. per annum. On failure to pay interest within five days after due, the holder may collect principal and interest at once; and in case suit is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit. This note is secured by first mortgage on — acres in —— county, Oregon.

No. —.

That thereupon, as a security merely for the faithful repayment of the said loan, the borrower duly executed to your orator as mortgagee a mortgage upon the real estate in said county then owned by such borrower, and your orator took and received into its possession at its office in Boston aforesaid all such notes and mortgages, at which place they have ever since been continuously and are now so held and kept; that the said notes and mortgages are so held and retained until their maturity and until the borrower desires or should make repayment; whereupon they, with proper release and discharge, are sent by post back to New York city or place of payment for the purpose of cancellation and collection merely.

4 Your orator further shows unto your honors that the said notes and mortgages were, at and prior to the passage of the act of the Legislature of the State of Oregon, hereinafter referred to, and now are, the property and assets of your orator, and as such were then and are now held and kept by your orator out of and from which to pay dividends to its stockholders and its just demands to its creditors and its lawful taxes and dues to the sovereignty and jurisdiction in which your orator resides and has all along been domiciled.

That all of the said notes and mortgages of your orator were taken and executed and actually removed and owned by your orator prior to the enactment of said pretended law hereinafter referred to, and the said notes and mortgages have at no time been, were not then or theretofore, and are not now, rightfully or at all, subject to the taxation to which it is sought to subject them, as hereinafter shown; that all of said notes and mortgages herein referred to are of differing and varying terms of maturity and do not generally accrue until the year 1886.

And your orator further shows unto your honors that ever since and for some few days prior to the passage of said pretended law hereinafter referred to it has ceased to do any business in the State in loaning its money at all, and that at no time since that date has your orator had, neither has it now, any office or place of business

in said State, and that at no time during the taking of said notes and mortgages did it have such office or place of business, but immediately upon the execution thereof the said Corbin Banking Company of New York city aforesaid, through its agent, then, but not since said enactment, a resident of this State, withdrew and forwarded to your orator, at its office, the said notes and mortgages.

And your orator further shows that under the law aforesaid the said several assessors of said several counties have attempted to assess and the said counties have levied taxes against your orator upon said mortgage indebtedness, and have taxed and assessed the same for the years 1883 and 1884, respectively, in the amounts specified herein below in each year and county, respectively:

County and sheriff.	Year.	Assessment.	Tax.
Polk county, J. F. Groves	1883	$25,850 00	$361 90
Washington county, B. P. Cornelius	1883	2,350 00	42 30
Benton county, Sol. King	1883	20,400 00	346 80
Douglas county, G. A. Taylor	1883	23,300 00	466 00
Lane county, J. R. Campbell	1883	28,900 00	462 40
Umatilla county, Wm. Martin	1883	34,600 00	678 16
Linn county, J. K. Charlton	1883	39,942 00	619 10
Yamhill county, E. B. Collard	1883	22,675 00	396 80
Union county, A. L. Saunders	1883	9,342 00	186 18
Total for	1883	$207,359 00	$3,559 64
Polk county, J. F. Groves	1884	$23,204 00	$324 86
Washington county, B. P. Cornelius	1884	700 00	11 20
Benton county, Sol. King	1884	20,400 00	346 80
Douglas county, G. A. Taylor	1884	27,300 00	573 30
Lane county, J. R. Campbell	1884	30,200 00	483 20
Umatilla county, Wm. Martin	1884	34,600 00	830 40
Linn county, J. K. Charlton	1884	46,120 00	718 86
Yamhill county, E. B. Collard	1884	22,675 00	396 80
Union county, A. L. Saunders	1884	8,075 00	169 57
Total for	1884	$213,274 00	$3,854 99

That, as your orator is informed, the said assessment for 1884 for Yamhill county upon $22,675 and said tax of $396.80 so levied was so assessed, and by said E. B. Collard, sheriff of Yamhill county, as such sheriff, without notice to your orator, and the said mortgage indebtedness of your orator for said county was not assessed by the assessor of said county, but, as your orator is informed and believes, the foreign-held mortgages in said county were, under instructions of said county or some of its officers, omitted purposely from assessment under said law hereinafter referred to, and were thereafter attempted to be assessed by said sheriff, as aforesaid.

And your orator alleges that all of these various defendants have now in their hands, as such sheriffs and tax collectors, warrants duly issued under the law, presently to be described, for the enforcement and collection of the various sums so set out and described as taxes for said years, respectively, under said pretended law, against these

debts and securities so in manner and form above described and owned by your orator, and thereabout your orator avers that these defendants have demanded payment of the same and of the whole thereof as by the terms and provisions of said pretended law, and that they threaten and are about to subject to sale under said pretended law the said debts and mortgages so owned, held, and retained by your orator in satisfaction of such and said demands and warrants for such alleged taxes.

And thereabout your orator says that all of said taxes are levied against and demanded of your orator in pursuance of and under an act of the Legislature of the State of Oregon, passed at its twelfth regular biennial session in the year 1882, entitled An act to define the terms, land, and real property for the purposes of taxation, which said act was approved by the Governor of said State on the 26th day of October, 1882, and is to be found on pages 64, 65, 66, and 67 of the session laws for said year. And your orator, further complaining, shows unto your honors that the said counties, the said assessors, and these defendants have, under said act, treated and classified the said debts and mortgages so owned, held, and retained in Boston, Massachusetts, as aforesaid, by your orator, as land or real property situated within the counties represented by the said defendants, respectively, and they have now in their hands warrants for the said taxes so levied and in said amounts so given; and they are, and each of them is, about to sell all of said debts and mortgages of your orator to satisfy said claims for said taxes, whereby the value of said debts or notes and mortgages is greatly impaired and your orator's title thereto clouded and attempted to be destroyed.

And, further complaining, your orator shows unto your honors that the said act was and is invalid and of no effect, for that the same was and is in violation of the constitution of the State of Oregon and also of the Constitution of the United States, and Amendments thereto and thereabout your orator says:

That said pretended act of the Legislature was never duly or constitutionally passed by the said Legislative Assembly of the State of Oregon, for that by section 18, article 4, of the constitution of said State, it is and was at the time of the pretended passage of said act, provided that bills for raising revenue shall originate in the house of representatives, and your orator avers that the bill for the act aforesaid was a bill for raising revenue, and that the same did not originate in the house of representatives, but in the senate of the said Legislative Assembly; and further, that every bill shall be read by sections on three several days in each house, unless, in case of emergency, two-thirds of the house where such bill may be pending shall, by a vote of yeas and nays, deem it expedient to dispense with this rule; and your orator says that the bill for said act was not read by sections or otherwise on three several days, nor did any exigency occur or appear for dispensing with the rule aforesaid, and your orator therefore says that said act never had any force or effect as a law of the State of Oregon, and your orator further avers that the said act is in violation of said constitution of the State of Oregon

for that the said act permits and allows to the citizens of said State, and enjoins and directs the assessors of said counties to deduct any and all indebtedness, secured or otherwise, they or any citizen may owe to any one, and to deduct the same from the assessment and valuation of their said lands or other resident property, while the said act in effect and in intention prohibits your orator and all others non-resident to said State, and having only such property as hereinbefore alleged, from making any such exemption or deduction; that the said provisions of said law, and the whole thereof, are in violation of section 1, article 9, of the said constitution of Oregon, for that by means of said deduction of indebtedness on the one hand, and the prevention on the other, and for that no deduction or indebtedness should be deducted or allowed, the said taxation is not equal and uniform and vitiates and avoids equal and uniform taxation, and so authorizes and directs certain of the property of residents to be exempted from taxation, and certain other of non-residents to be taxed.

And your orator, further complaining, says that the said act was and is so in violation of the Constitution of the United States, for the following reasons:

It changes and materially alters the contract rights of your orator, under and by virtue of the loans it had made prior to the passage of said act (and they were all such), in this, that by such contracts the borrowers in all cases were obliged by law to pay the taxes on said mortgaged lands, and were not allowed to deduct any indebtedness against the same on account of said loans, and these notes and mortgages were then not taxable in this State, whereas now the said notes and mortgages are made liable to pay said taxes without any right to deduct any indebtedness, and thereby relieving the mortgagors, not only of the burdens they had by law and under laws theretofore assumed, but permitting their lands and other property to escape and be relieved from taxation by offsetting said indebtedness against said lands and property.

It undertakes by pure fiction of law, and in the absence of the owner and the property, to change the actual *situs* of these notes and mortgages, which, as before alleged, were then and are now held and owned and actually kept by your orator in Boston, Massachusetts, and thereby the said act attempts to give to the taxing power of said State an extra-territorial jurisdiction, and to subject persons and property beyond the limits of said State to its sovereignty.

It impairs all these contracts, out of which these notes and mortgages have come, in this—that it adds new conditions and imposes new terms; it takes from one party thereto a beneficial right, and confers said right upon the other party thereto, without the consent of either, all under the avowed pretense of laying a tax.

It impairs, and in effect destroys, the negotiable character of negotiable promissory notes and other instruments, whenever and as soon as they may have been secured by mortgage upon land in this State.

It provides, as the sole remedy for its enforcement, a method which itself is unconstitutional, in this—that while nominally assess-

ing the mortgagee by the record it subjects to sale the indebtedness of the mortgagor, the ownership of which may have passed out of the mortgagee at the time of such assessment, or subsequently to innocent purchasers; and, further, in this—that it attempts to subject to sale the debt which exists independent of the mortgage, and which is in no sense necessary or, by said act, an estate or interest in said mortgage or said mortgaged lands.

It undertakes to tax here these notes and mortgages so held, owned, and kept in Boston, Massachusetts, aforesaid, and which by the comity of nations and States are properly taxable, and only taxable there, and which are so taxed there.

It impairs the obligations of contracts by subjecting the security to a lien, as well as by attempting to subject the debt to the same lien, in the hands of the debtor.

It involves a taking away of property without due process of law, there being no process of law provided by this act, or by any other act or law, whereby a debt, together with the relative mortgage, may be sold in the same manner and with like effect that real
6 property or land is sold for payment of taxes, and no such process of law is in the nature of things possible, and any sale of debts or mortgages under said act must be necessarily without the secured opportunity of redemption provided for by law in the case of land sold for taxes, and in this, further, that after sale it denies to the purchaser or the former owner any right of action or suit upon said debt or mortgage for the period of two years and more, and, after redemption is lost or the time expires, affords no defense or protection to the mortgagor against double payment of said demand or claim of the mortgagee and said purchaser.

And, further complaining, your orator shows unto your honors that this act is in violation of the constitution of the State of Oregon, for that it distinguishes secured from unsecured promissory notes, and in effect makes the one taxable while relieving the other.

It involves a double taxation of property, which is arbitrarily and unnecessarily imposed upon non-residents, and to relieve resident debtors.

It distinguishes mortgages over land situated in no more than one county from other mortgages, and thus destroys uniformity and equality of taxation, and also contravenes section 23, article 4, of the constitution, prohibiting special or local laws for the assessment or collection of taxes.

It contravenes section 22 of said article 4 by enacting that debts and mortgages may be sold in like manner and with like effect as land is sold for the payment of taxes.

For these, and other reasons to be shown, your orator says that this tax law, if properly passed, was and is in violation of the Constitution of the United States and of the constitution of the State of Oregon.

And your orator further avers and charges that in the assessment of the said taxes against your orator the said notes and mortgages securing them are, and have been, assessed in the several counties aforesaid at the amount and valuation of the nominal face value

of the debt and at the amount which the mortgage is given to secure, and the said sheriffs of said respective counties are threatening to and are about to collect the taxes so assessed under said warrants now in their hands, respectively, for the collection thereof, but your orator avers that in each and all of said counties aforesaid the lands therein were only assessed at one-third of their value, and that the result thereof is unjust, unequal, and not uniform taxation, and causes real property, other than mortgages, to pay one-third only of the actual amount which it ought to pay and the said mortgages to pay two-thirds more than they ought to pay; and further, that under the same law the said assessors have assessed said taxes upon said mortgages at one rule of value and upon the lands mortgaged at another and different rule of value.

And forasmuch as your orator is without any adequate or appropriate remedy, save in a court of equity, where all such matters are properly cognizable and relievable, and in order to prevent a multiplicity of suits and actions to try and determine exactly the questions presented by this bill, your orator humbly prays for a writ of injunction *pendente lite* against each and all of the defendants, to wit: J. F. Groves, sheriff of Polk county, Oregon; B. P. Cornelius, sheriff of Washington county, Oregon; Sol. King, sheriff of Benton county, Oregon; G. A. Taylor, sheriff of Douglas county, Oregon; J. R. Campbell, sheriff of Lane county, Oregon; Wlliam Martin, sheriff of Umatilla county, Oregon; J. K. Charlton, sheriff of Linn county, Oregon; E. B. Collard, sheriff of Yam Hill county, Oregon; A. L. Saunders, sheriff of Union county, Oregon; and that upon the final hearing of this cause said injunction may be made perpetual, enjoining them, and each of them, and all persons acting under them, from collecting or proceeding to collect all and each of said amounts or sums of money so demanded as aforesaid from your orator as taxes; that the collection of the same may be forever enjoined, prohibited, and prevented, and that your honors will be graciously pleased to decree, in the event of determining that the said mortgage tax law is not open to the constitutional objections made, and that the mode of so assessing said property and levying said taxes does not render the whole of said assessment void, and the whole of said taxes not collectible or capable of segregation from any legal amount that might otherwise have been due, that the taxes assessed upon the property of your orator are assessed in undue proportion; that said defendants, and each of them, be enjoined from collecting any greater part of said tax assessed than your honors shall determine to be just and proper, if the same be not thereby void; and further, that the said J. F. Groves, sheriff of Polk county, Oregon; B. P. Cornelius, sheriff of Washington county, Oregon; Sol. King, sheriff of Benton county, Oregon; G. A. Taylor, sheriff of Douglas county, Oregon; J. R. Campbell, sheriff of Lane county, Oregon; William Martin, sheriff of Umatilla county, Oregon; J. K. Charlton, sheriff of Linn county, Oregon; E. B. Collard, sheriff of Yam Hill county, Oregon; A. L. Saunders, sheriff of Union county, Oregon, may, upon their several and respective corporal oaths, according to the best and utmost of their several and respective knowl-

edge, remembrance, information, and belief, full, true, perfect, and distinct answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and they thereunto severally and respectively distinctly interrogated, and more especially that the said defendants, J. F. Groves, sheriff of Polk county, Oregon; B. P. Cornelius, sheriff of Washington county, Oregon; Sol. King, sheriff of Benton county, Oregon; G. A. Taylor, sheriff of Douglas county, Oregon; J. R. Campbell, sheriff of Lane county, Oregon; William Martin, sheriff of Umatilla county, Oregon; J. K. Charlton, sheriff of Linn county, Oregon; E. B. Collard, sheriff of Yam Hill county, Oregon; A. L. Saunders, sheriff of Union county, Oregon, and each of them, may, in manner aforesaid, answer and set forth whether—

First. The taxes assessed in the county of which you are the sheriff were not assessed upon the basis of valuing the land and improvements thereon in said county at not more than one-third of their actual cash value, according to the valuation as fixed in private sales thereof in the ordinary course of business; and,
7 if valued at more, what was the actual valuation at which such lands are assessed in proportion to the real value thereof, or in proportion to the value as agreed upon by parties actually buying and selling such lands at private and ordinary sales, and whether the valuations upon the assessment-roll of your county were the actual values of said land and improvements, or were the values thereof as fixed and agreed upon by the purchasers and vendors thereof at private sale in the usual aud ordinary course of business, and whether or not mortgages on land in your county are assessed and valued at the amount appearing to be due thereon; and if not, at what valuation are they assessed in proportion to the debt secured thereby?

Second. Whether the amounts assessed upon mortgages on lands in your county are not greater, and in what proportion greater in respect to the debt secured thereby, than the amounts assessed upon lands in your county bear to the real and actual cash value of said lands, or to the agreed value as fixed and made by purchasers and vendors thereof at private sales in the usual and ordinary course of business.

Third. Whether it is not true, according to your best knowledge, that mortgages upon lands in your county are assessed and valued at a higher valuation, and what valuation relatively, than the lands in said county on the assessment-roll thereof, and whether this undervaluation of lands by your assessor is not done advisedly and avowedly to prevent your county from paying a relatively greater proportion of its State taxes, and to make and require mortgages to pay relatively a greater proportion of all taxes than lands.

Fourth. Whether it is not true that the parties owing these mortgages and any indebtedness, without reference to where it may be

held or owned, do not regularly deduct from their assessable property and the valuation of their mortgaged lands and all other property all such indebtedness at its face value, and whether or not such deduction does not regularly and intentionally remove from the burdens of taxation property of said debtors of three times the value of said indebtedness, including much other property not mortgaged, and of this particularly and in detail.

And may it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be issued out of this honorable court, under seal thereof, addressed to the said defendants, J. F. Groves, sheriff of Polk county, Oregon; B. P. Cornelius, sheriff of Washington county, Oregon; Sol. King, sheriff of Benton county, Oregon; G. A. Taylor, sheriff of Douglas county, Oregon; J. R. Campbell, sheriff of Lane county, Oregon; William Martin, sheriff of Umatilla county, Oregon; J. K. Charlton, sheriff of Linn county, Oregon; E. B. Collard, sheriff of Yam Hill county, Oregon; A. L. Saunders, sheriff of Union county, Oregon, commanding the said defendants and each of them to be and appear before your honors in this honorable court at a time and place and under a penalty therein stated, and then and there full, true, and perfect answer to make to the said interrogatories addressed to them and each of them, and to all and singular the premises and matters in the bill of complaint contained, and to stand to, perform, and abide by such order and decree as your honors shall see fit to make in the premises, and that your honors will be graciously pleased to grant the specific relief hereinbefore prayed for, and for such other and further and different relief as to your honors shall seem meet with equity and justice and as may appertain to the practice of this honorable court.

W. D. FENTON,
STOTT & STOTT,
Solicitors and Attorneys for Plaintiff.

The defendants, J. F. Groves, sheriff of Polk county, Oregon; B. P. Cornelius, sheriff of Washington county, Oregon; Sol. King, sheriff of Benton county, Oregon; G. A. Taylor, sheriff of Douglas county, Oregon; J. R. Campbell, sheriff of Lane county, Oregon; William Martin, sheriff of Umatilla county, Oregon; J. K. Charlton, sheriff of Linn county, Oregon; E. B. Collard, sheriff of Yam Hill county, Oregon; A. L. Saunders, sheriff of Union county, Oregon, are hereby required to answer the interrogatories numbered, respectively, first, second, third, fourth.

W. D. FENTON,
STOTT & STOTT,
Solicitors and Attorneys for Plaintiff.

UNITED STATES OF AMERICA, *District of Oregon:*

I, W. D. Fenton, being first duly sworn, depose and say that I have read the foregoing bill of complaint and know its contents, and that the same is true, except as to those matters therein stated

on information and belief, and as to those matters therein stated on information and belief I believe it to be true; and I further say that I am attorney for plaintiff in this State and one of its attorneys herein; that plaintiff is a foreign corporation, and that the reason I make this verification is that plaintiff has no agent or attorney-in-fact as such in this State, and that none of its officers authorized to verify the same are now within the State of Oregon.

W. D. FENTON.

Subscribed and sworn to before me this 6th day of May, A. D. 1885.

[NOTARIAL SEAL.] FRANK W. FENTON,
Notary Public for Oregon.

Endorsed: Filed May 6, 1885. R. H. Lamson, clerk.

8 And afterwards, to wit, on the 6th day of May, 1885, there was issued out of said court a restraining order in this cause in words and figures as follows, to wit:

9 In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY
vs.
J. F. GROVES *et al.* } No. 1140.

MAY 6, 1885.

Upon reading and filing the bill in the above-entitled cause and hearing Mr. Raleigh Stott and Mr. W. D. Fenton, of counsel for the complainant, it is ordered that the above-named defendants do appear before this court at the United States court-room, in Portland, in said district, on Monday, May 18, 1885, provided a copy of said bill and of this order be served upon each of them at least ten days before said day, if it be a court day, or else on the court day next following, at ten o'clock a. m. of said day, then and there to show cause, if any, why a provisional injunction should not issue herein according to the prayer of the bill in that behalf.

And it is further ordered that, in the meantime and until the further order of the court herein, the said defendants and each of them, their agents and servants, be, and they hereby are, severally restrained from doing any of the acts complained of in said bill.

(Signed) DEADY, *J.*

Endorsed: Filed May 6, 1885. R. H. Lamson, clerk.

10 And afterwards, to wit, on the 25th day of May, 1885, there was duly filed in said court appearances for defendants in this cause in words and figures as follows, to wit:

10½ In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY
vs.
J. F. GROVES, Sheriff, *et al.* } No. —.

To the clerk of the above-entitled court:

You will please enter *my* appearance as solicitors in the above-entitled cause for the defendant, E. B. Collard.

H. HURLEY, L. LAUGHARY &
GEO. E. CHAMBERLIN,
Sol. for E. B. Collard.

Endorsed: Filed and entered May 25, 1885. R. H. Lamson, clerk.

11 In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY
vs.
J. F. GROVES *et al.* } No. —.

To the clerk of the above-entitled court:

You will please enter *my* appearance as solicitors in the above-entitled cause for the defendants, J. F. Groves, B. P. Cornelius, Sol. King, Wm. Martin, & J. K. Charlton.

R. S. STRAHAN & JNO. BURNETT,
Att'ys for said Def'ts.

Endorsed: Filed May 25, 1885. R. H. Lamson, clerk.

12 In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY
vs.
J. F. GROVES, Sheriff, *et al.* } No. —.

To the clerk of the above-entitled court:

You will please enter *my* appearance as solicitors in the above-entitled cause for the defendants, G. A. Taylor, sheriff of Douglas county, Oregon, and J. R. Campbell, sheriff of Lane county, Oregon.

JAMES F. WATSON,
E. B. WATSON,
Solicitors for said Defendants.

Endorsed: Filed and entered May 25, 1885. R. H. Lamson, clerk.

13 And afterwards, to wit, on the 25th day of May, 1885, there was duly filed in said court a demurrer in words and figures as follows, to wit:

14 In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY of Windham County, State of Connecticut, Plaintiff,

vs.

J. F. GROVES, Sheriff of Polk County, *et al.*

Now on this day comes the defendant, E. B. Collard, sheriff of Yam Hill county, by his attorneys, H. Hurley, L. Laughary, and Geo. E. Chamberlin, and by protestation, not confessing or acknowledging all or any of the matters and things in said bill alleged to be true in such manner and form as therein set forth, demurs to said complainant's bill, and for cause thereof showeth:

First. That said complaint does not state facts sufficient to entitle the plaintiff to any relief in this court, or to the relief prayed for in said bill.

Second. That there is a defect of parties defendant in this, that the county of Yam Hill ought to be joined with E. B. Collard as defendant in this suit, as said county is a necessary party to a final and complete determination of this suit.

Third. That the complaint is multifarious, for that it joins and unites in the same complaint several and distinct matters of complaint that have no connection with each other; each of said defendants is acting separately and under distinct warrants, and no combination or common purpose is shown or charged in said complaint, and there is no privity between the said defendants or either of them.

Fourth. The cause of said suit being several and distinct with respect to each defendant, the court has not jurisdiction of the subject-matter thereof in this, that the real amount in controversy in the separate cases is less than $500.00, exclusive of costs.

Fifth. It appears from said complaint that there is nothing
15 but error or illegality charged in making said assessments, and the valuation of the property described in said complaint by the assessor, and, there being no fraud charged, this court has no jurisdiction to correct mere error or illegality in appraisements or valuation of property.

Wherefore, and for divers other errors and imperfections, this defendant demands the judgment of this court whether he shall be compelled to make any further or other answer to said bill or any of

the matters and things therein contained, and prays to be hence dismissed with his costs in this behalf.

I, H. Hurley, hereby certify that in my judgment the foregoing demurrer of E. B. Collard, one of the defendants to the bill of complaint of the plaintiff above named, is well founded in law and proper to be filed in this suit.

H. HURLEY, L. LAUGHARY &
GEO. E. CHAMBERLIN,
Att'ys and Solicitors for Def't, E. B. Collard.

STATE OF OREGON, *County of Multnomah, ss:*

I, E. B. Collard, being duly sworn, depose and say that I am the defendant above named, and that I have examined the above demurrer, and that the same is not made for delay.

Endorsed: Filed May 25, 1885. R. H. Lamson, clerk.

16 And afterwards, to wit, on the 30th day of May, 1885, there was duly filed in said court an appearance of defendants in words and figures as follows, to wit:

17 In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY
vs.
J. F. GROVES, Sheriff of Polk County, *et al.* } No. —.

To the clerk of the above-entitled court:

You will please enter *my* appearance as solicitors in the above-entitled cause for the defendants, A. L. Saunders, sheriff of Union county, Oregon, and William Martin, sheriff of Umatilla county, Oregon.

GEARIN & GILBERT.

Endorsed: Filed and entered May 30, 1885. R. H. Lamson, clerk.

18 And afterwards, to wit, on the 5th day of June, 1885, there was duly filed in said court a demurrer in words and figures as follows, to wit:

19 In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY, Plaintiff,

vs.

J. F. GROVES, Sheriff of Polk County, Oregon; B. P. CORNELIUS, Sheriff of Washington County, Oregon; Sol. King, Sheriff of Benton County, Oregon; G. A. Taylor, Sheriff of Douglas County, Oregon; J. R. Campbell, Sheriff of Lane County, Oregon; William Martin, Sheriff of Umatilla County, Oregon; J. K. Charlton, Sheriff of Linn County, Oregon; E. B. Collard, Sheriff of Yam Hill County, Oregon; A. L. Saunders, Sheriff of Union County, Oregon, Defendants.

The demurrer of J. F. Groves, Sol. King, B. P. Cornelius, Wm. Martin, and J. K. Charlton, defendants, to the bill of complaint of The New England Mortgage Security Company.

The defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur thereto, and, for causes of demurrer to the said bill, show that it appears by the said bill that the same is exhibited against these defendants and their codefendants for several distinct matters and causes, in many whereof, as appears by the said bill, these defendants are not in any manner, jointly, severally, or otherwise, interested or concerned; by reason of which distinct matters the said complainant's said bill is drawn out to a considerable length, and these defendants are compelled to take copies of the whole thereof, and, by joining these defendants and distinct causes together, which do not depend on each other,

20 in the said bill, the pleadings, orders, and proceedings in the progress of said suit will be intricate and prolix and these defendants be put to unnecessary and unreasonable charges in taking copies of the same, although several parts thereof in no way relate to or concern them severally; and these defendants, for further cause of demurrer, severally showeth that said complainant hath not, by its own showing, made out a case which establishes its right to the relief prayed for in said bill, or to any equitable relief whatever.

And, for further causes of demurrer, these defendants show:

1st. That it appears from the said bill of complaint that the complainant hath a plain, speedy, and adequate remedy at law for the grievances set up in said bill.

2d. In fixing the value of property for the purposes of taxation assessors and boards of equalization act judiciously and their decisions cannot be attacked collaterally and overthrown in a case where they have jurisdiction, unless fraud is shown.

3d. In the absence of fraud the writ of review authorized by the code of civil procedure is the only mode by which the decisions of assessors and boards of equalization fixing the value of property for purposes of taxation can be reviewed in this State.

4th. Equity has no jurisdiction under its general powers to correct a merely unequal or unjust assessment where there is a statutory board that may do so.

5th. There is a defect of parties defendant, in this, that the counties of Polk, Benton, Linn, and Umatilla ought to be joined as defendants herein, to the end that a complete determination of said controversy may be had.

6th. The causes of suit being several, separate, and distinct with respect to each defendant herein, the court has no jurisdiction of the subject-matter thereof, in this, that the real amount in controversy in the separate cases, as appears by the said bill, is less
21 than $500, exclusive of costs.

7th. In no event will equity enjoin the collection of a tax until the plaintiff shall have first paid what is actually due.

R. S. STRAHAN & JNO. BURNETT,
Att'ys for J. F. Groves, B. P. Cornelius, Sol. King, Wm. Martin, J. K. Charlton.
GEO. E. CHAMBERLIN,
Dist. Att'y for Charlton and Groves.
COX & MINER, *For Martin.*

I, R. S. Strahan, one of the attorneys for the defendants named in this demurrer, hereby certify that in my opinion the foregoing demurrer is well founded in law.

R. S. STRAHAN.

STATE OF OREGON, } ss:
County of Linn, }

I, J. K. Charlton, one of the defendants in the above-entitled suit, do depose and say that the foregoing demurrer is interposed in good faith and not for the purposes of delay.

J. K. CHARLTON.

Subscribed and sworn to before me this June 1, 1885.

D. ANDREWS, [SEAL.]
County Clerk of Linn County, Oregon.

STATE OF OREGON, } ss:
County of Polk, }

I, J. F. Groves, one of the defendants herein, do depose and say that the foregoing demurrer is interposed in good faith and not for the purposes of delay.

J. F. GROVES.

Subscribed and sworn to before me this June 2, 1885.

D. W. SEARS,
Clerk Polk Co., Or.

STATE OF OREGON, }
County of Benton, } ss:

I, Sol. King, being first duly sworn, say I am one of the defendants herein, and that the foregoing demurrer is interposed in good faith and not for purposes of delay.

SOL. KING.

22 Subscribed and sworn to before me this June 1, 1885.

JOHN BURNETT, [SEAL.]
Notary Public for Oregon.

STATE OF OREGON, }
County of Washington, } ss:

I, B. P. Cornelius, one of the defendants herein, being first duly sworn, do depose and say that the foregoing demurrer is interposed in good faith and not for purposes of delay.

B. P. CORNELIUS,
Sheriff of Washington County, Oregon.

Subscribed and sworn to before me this June 4, 1885.

J. W. MORGAN,
Clerk Circuit Court, Washington Co., Or.

STATE OF OREGON, }
County of Umatilla, } ss:

I, William Martin, being first duly sworn, say the annexed and foregoing demurrer is interposed in good faith and not for the purposes, of delay.

WM. MARTIN.

Subscribed and sworn to before me this June 5, 1885.

J. P. BUSHEE, [SEAL.]
County Clerk.

Endorsed: Filed June 5, 1885. R. H. Lamson, clerk.

23 And afterwards, to wit, on the 8th day of June, 1885, there was duly filed in said court a separate demurrer of defendant, J. R. Campbell, in words and figures as follows, to wit:

24 In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY, Plaintiff,

vs.

J. F. GROVES, Sheriff of Polk County, Oregon, *et al.*

The demurrer of J. R. Campbell, defendant to the bill of complaint of The New England Mortgage Security Company, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are

therein set forth, doth demur thereto, and, for cause of demurrer, showeth that it appears by the said bill that the same is exhibited against this defendant and his codefendants for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is not in any manner interested or concerned; by reason of which distinct matters the said complainant's said bill is drawn out to a considerable length and this defendant is compelled to take a copy of the whole thereof, and, by joining this defendant and distinct matters together, which do not depend on each other, in the said bill, the pleadings, orders, and proceedings, will in the progress of said suit be intricate and prolix and this defendant put to unreasonable and unnecessary charges in taking copies of the same, although several parts thereof in no way relate to or concern him; and this defendant, for further cause of demurrer, showeth that the said complainant hath not by its own showing made out a case which establishes its right to the relief prayed for in said bill or to any equitable relief whatever, in this—

1. That it appears from said bill that complainant has a plain, speedy, and adequate remedy at law for the grievances set up in said bill.

2. That it does not appear from said bill of complaint that the said complainant has ever offered to pay or tendered to the several defendants therein named the taxes actually due and which it was its duty to pay.

3. That it does not appear from said bill that any of the taxes therein described were or are wrongfully assessed or demanded.

4. That complainant does not by its said bill show any right or title to any injunction or other relief against this defendant, and the said defendant, for further cause of demurrer, showeth that Lane county appears by said bill to be a necessary party to said suit and is not made a party thereto. Wherefore, and for divers other defects and causes of demurrer appearing in the said complainant's said bill, this defendant doth demur thereto, and humbly demands the judgment of this honorable court whether he shall be compelled to make any answer to the said bill, and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

JAMES F. WATSON,
E. B. WATSON,
Solicitors for J. R. Campbell, Sheriff of Lane County, Defendant.

I, James F. Watson, one of the attorneys for the defendant, J. R. Campbell, hereby certify that in my opinion the foregoing demurrer is well founded in law.

JAMES F. WATSON,
Attorney for J. R. Campbell, Defendant.

STATE OF OREGON, } ss:
Lane County, }

I, J. R. Campbell, one of defendants herein, being duly sworn, say the foregoing demurrer is not interposed for delay.

J. R. CAMPBELL.

Subscribed and sworn to before me this May 30, 1885.
GEO. S. WASHBURNE,
County Judge for Lane County, Oregon.

Endorsed: Filed June 8, 1885. R. H. Lamson, clerk.

26 And afterwards, to wit, on the 8th day of June, 1885, there was duly filed in said court a separate demurrer — G. A. Taylor, defendant, in words and figures as follows, to wit:

27 In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY

vs.

J. F. GROVES, Sheriff of Polk County, Oregon, *et al.*

The demurrer of G. A. Taylor, defendant, to the bill of complaint of the New England Mortgage Security Company, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein contained and set forth, doth demur thereto, and, for cause of demurrer, showeth that it appears by the said bill that the same is exhibited against this defendant and his codefendants for several distinct matters and causes, in many whereof, as appears by the said bill, this defendant is not in any manner interested or concerned; by reason of which distinct matters the said complainant's bill is drawn out to a considerable length and this defendant is compelled to take a copy of the whole thereof, and, by joining this defendant and distinct matters together, which do not depend on each other, in the said bill, the pleadings, orders, and proceedings will in the progress of the said suit be intricate and prolix and this defendant put to *the* unreasonable and unnecessary charges in taking copies of the same, although several parts thereof in no way relate to or concern him; and this defendant, for further cause of demurrer, showeth that the said complainant hath not by its own showing made out a case which establishes its right to the relief prayed for in said bill or to any equitable relief whatever, in this—

1. That it appears from said bill that complainant has a plain, adequate, and speedy remedy at law for the grievances set up in said bill.

28 2. That it does not appear from said bill of complaint that the said complainant has ever tendered or offered to pay to the several defendants therein named the taxes actually due and which it was its duty to pay.

3. That it does not appear from said bill that any of the taxes therein described were or are wrongfully assessed or demanded.

4. That complainant does not by its said bill show any right or title to any injunction or other relief against this defendant; and the

said defendant, for further cause of demurrer, showeth that Douglas county appears by said bill to be a necessary party to said suit and is not made a party thereto.

Wherefore, and for divers other defects and causes of demurrer appearing in the said complainant's said bill, this defendant doth demur thereto and humbly demands the judgment of this honorable court whether he shall be compelled to make any answer to the said bill, and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

E. B. WATSON,
JAMES F. WATSON,
Solicitors for G. A. Taylor, Sheriff of Douglas County, Defendant.

I, James F. Watson, one of the solicitors for G. A. Taylor, defendant, hereby certify that in my opinion the foregoing demurrer is well founded in law.

JAMES F. WATSON,
Attorney for G. A. Taylor, Defendant.

STATE OF OREGON, } *ss:*
Douglas County, }

I, G. A. Taylor, one of the defendants herein, being duly sworn, say the foregoing demurrer is not interposed for delay.

G. A. TAYLOR,

Subscribed and sworn to before me this June 1, 1885.

J. S. FITZHUGH,
County Judge.

Endorsed: Filed June 8, 1885. R. H. Lamson, clerk.

29 And afterwards, to wit, on Monday the 13th day of July, 1885, the same being the 41st judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

30 In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY
vs.
J. F. GROVES, Sheriff, *et al* } No. 1140

JULY 13, 1885.

This cause was heard on the order to show cause why a preliminary injunction should not issue as prayed in the bill, and upon the separate demurrers filed by the several defendants to the bill, and was argued by Mr. J. W. Whalley, of counsel for complainant, and by Mr. A. H. Tanner, Mr. J. F. Watson, Mr. R. S. Strahan, Mr.

J. Burnett, Mr. W. B. Gilbert, and Mr. H. Hurley, of counsel for the respective defendants; on consideration whereof it is ordered that the motion for a preliminary injunction be, and the same is hereby, denied, and that said demurrers be, and they are hereby, sustained.

(Signed) DEADY, J.

Endorsed: Filed July 13, 1885. R. H. Lamson, clerk.

31 And afterwards, to wit, on the 13th day of July, 1885, there was duly filed in said court an opinion by the court, in words and figures as follows, to wit:

32 U. S. Circuit Court, District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY
vs.
J. F. GROVES, Sheriff of Polk County, and Eight Others, Sheriffs of Certain Counties. Same. } No. 1140.

MONDAY, *July* 13, 1885.

(1) *Mortgage tax law of* 1882. On the question of whether this act of the Legislature conforms to the constitution of Oregon, this court follows the judgment of the supreme court of the State in Mumford *v.* Sewell, 11 Or., 67, and Crawford *v.* Linn County, *Id.*, 482; and on the question, Is it in conflict with the Constitution of the United States, the ruling of this court in the Dundee Mortgage Trust Investment Company *v.* School District No. 1, 19 Feb. Rep., 359, and 21 *Id.*, 151, is followed.

(2) *An act for raising revenue.* The mortgage tax law does not levy any tax or raise any revenue, but only provides that when a tax is levied or a revenue raised that mortgages shall contribute thereto as land.

(3) *Unequal assessments.* Where the law requires that mortgages shall be valued for taxation at their face value and all lands at their "true cash value," and the assessor of a county willfully and uniformly values the mortgages on lands therein at their face value, and the lands therein at only one-third of their cash value, such assessment is illegal, and the payment of the two-thirds of the tax thereby imposed on said mortgages may be enjoined.

(4) *Tender of payment of tax.* A suit to enjoin the collection of a tax cannot be maintained in the courts of the United States, unless it appears that the plaintiff has paid or offered to pay so much of such tax as he concedes to be due or as may be shown that he ought to pay.

DEADY, *J.:*

These suits are brought by the plaintiffs, who are foreign corporations, to have the several defendants enjoined, as sheriffs of their respective counties, from collecting certain taxes levied by such

counties upon sundry mortgages belonging to them, under the act of October 26, 1882, (ses. laws, 64), commonly called "the mortgage tax law," by the sale of the same.

Motions for provisional injunctions on the bills and demurrers thereto on the ground of the invalidity of the law and the illegality of the tax were argued and submitted together.

The bills are substantially the same, and from them it appears that the first two corporations are formed under the laws of Great Britain—the Dundee company having its principal office at the burg of Dundee, Scotland, and the London one at London, England; the third is formed under the laws of Connecticut, and has its principal office at Boston, Massachusetts, and each is formed for the purpose of loaning money in this State on note and mortgage, which notes are made payable and kept without the State at such principal offices respectively; that the Dundee company, as assignee of two former companies of that place, and in its own right, is the owner of $645,317.29 in value of such notes and mortgages for money loaned in this State prior to the passage of said act, except $90,000 thereof, upon which the various counties named in its bill levied a tax in 1884, amounting to $9,927.32; that the Connecticut and London companies are the owners of such notes and mortgages for money loaned in this State prior to the passage of said act, upon which a tax was levied by the several counties named in their respective bills for the years 1883 and 1884, as follows: The Connecticut company of the value of $207,359.00 in 1883 and of the value of $213,274.00 in 1884, and the London company of the value of $112,368.00 in 1883 and of the value of $114,027.00 in 1884—upon the former of which a tax has been levied by said counties of $7,414.63, and on the latter of $3,914.77.

The objections made by the bills to the validity of the law and the legality of the tax may be summarized as follows:

(1). The act is void, because passed contrary to the constitution of the State, in these particulars: (*a*) it is an act "for raising revenue," but originated in the senate instead of the house, contrary to § 18 of article IV thereof; (*b*) it was not read by sections on three several days in each house, as required by § 19 of said article; (*c*) it involves double taxation, and distinguishes between secured and unsecured notes and one and two county mortgages, and permits the indebtedness of residents to be deducted from their assessments, and forbids the same in the case of non-residents, contrary to § 1, article IX, thereof; (*d*) it provides that debts and mortgages may be sold for the non-payment of taxes, the same as land; (*e*) it is a special or local law for the assessment and the location of taxes, contrary to § 23 of said article IV; (*f*) the plaintiff's mortgages are assessed in said counties at the nominal value of the debt secured thereby, while the other lands situated therein are assessed at but one-third of their value, thereby causing unequal and ununiform taxation of the same kind of property, contrary to § 1 of said article IX.

(2.) The act is void, because in conflict with the Constitution of the United States, in these particulars: (*a*) it impairs the obligation of the contract whereby the mortgagor was to pay all taxes on the

note and mortgage, and "in that it undertakes to change the *situs* of notes and mortgages," which prior to said act were owned and held elsewhere than in Oregon; (*b*) it impairs the negotiability of promissory notes secured by mortgage on real property; (*c*) the sale of the debt and mortgage involves the taking of private property without due process of law.

(3.) The assessment in Yam Hill county is made or about to be made by the sheriff, and is therefore void.

The question of the validity of the act of 1882 was before the supreme court of the State in Mumford *v.* Sewell, 11 Or., 67, and Crawford *v.* Linn County, *Id.*, 482, and also before this court in Dundee Mortgage Trust Investment Company *v.* School District No. 1, 19 Fed. Rep., 359, and 21 *Id.*, 151.

In the cases decided in the State court it was held:

(1) The State may tax a mortgage in the county where recorded without reference to the residence of the owner; (2) an act authorizing such a tax does not impair the obligation of any contract between the mortgagor and the mortgagee; (3) the original bill on file in the secretary of state's office shows that the act was read on three several days as required by § 19 of article IV of the State constitution, and that is sufficient; (4) the act is not in conflict with § 1 of article IX nor § 32 of article 1 thereof, concerning uniformity and equality of taxation, and does not exempt two county mortgages from taxation, but leaves then subject thereto under previously existing laws; (5) the Legislature may fix the *situs* of personal property for the purpose of taxation without violating the provision of the State constitution concerning equality of taxation; (6) the phrase "special law," as used in § 23 of article IV of the State constitution, is synonymous with "private law," and whether a law is public or private depends on the subject-matter; and (7) the act in question is a public one and therefore not a private or "special" one.

In the case before this court it was held:

(1) Equity has jurisdiction to enjoin the collection of a tax levied under an invalid law when necessary to prevent a multiplicity of suits; (2) the act in question does not impair the obligation of any contract between a mortgagor and mortgagee concerning the payment of the tax on the mortgaged premises or the debt secured thereby; the State is no party to such contract, and its power to impose and collect taxes on persons, property, and business within its jurisdiction cannot be affected or restrained thereby; (3) the State may, so long as it does not trench on the Constitution of the United States, tax all persons, property, and business within its jurisdiction or reach, and whether any person, property, or business is within its jurisdiction is not a Federal question and must be determined by the State for itself.

This court also held in that case that the act was void, because in conflict with § 1 of article IX of the State constitution requiring uniformity in assessment for taxation, and also that the act was a special one and therefore void, because in conflict with subdivision 10 of § 23 of article IV thereof, and that the enforcement by the State of a tax levied under such an act is a deprivation of property with-

out due process of law, contrary to § 1 of the XIV Amendment to the Constitution of the United States.

This court will follow the decisions of the State court touching the validity of this act, when compared with the constitution of the State, and therefore all objections to the enforcement of this tax on that ground are out of place, and will be overruled without further consideration. Greene *vs.* Neal's Lessee, 6 Pet., 291; Stone *vs.* Wisconsin, 94 U. S., 181; Town *vs.* Perkins, *Id.*, 267; Burgess *vs.* Seligman, 107 U. S., 33.

Conceding, then, that the judgments of the State court, in Mumford *v.* Sewell and Crawford *v.* Linn County, so far as they declare the act to be in conformity with the State constitution, furnish the rule of decision in this case, and assuming that the rulings heretofore made by this court in Dundee Mortgage T. & I. Company *v.* School District No. 1, so far as the same relate to Federal questions, will be followed, there are but two objections to the enforcement of the tax left for consideration: (1) the act is one for
33 raising revenue, and therefore void, because it did not originate in the house; and (2), admitting the law to be valid, the tax is illegal because of the unlawful conduct of the persons who made the assessment of property in these various counties, whereby the plaintiff's mortgages are valued and taxed at two-thirds more than the lands in the said counties.

In Mumford *v.* Sewell, *supra*, 71, Justice Waldo, speaking for the court, said: "Some of us have had considerable doubt whether the bill is not properly a bill for raising the revenue, and, therefore, in violation of § 18 of article IV of the State constitution, because it originated in the senate," and concludes that the point is not sufficiently clear, as then advised, to warrant the court in declaring the law unconstitutional on that ground. In Crawford *v.* Linn County the point does not seem to have been mooted.

But I am clear that this is not a bill for raising revenue. True, it provides that when revenue is to be raised mortgages shall contribute thereto as land; but it does not authorize or provide for levying any tax or raising a cent of revenue. A bill for raising revenue, or a "money bill," as it was technically called at common law, is a bill levying a tax on all or some of the persons, property, or business of the country for a public purpose; and the assessment or listing and valuation of the polls or property preliminary thereto, and all laws regulating the same, are merely measures to secure what may be deemed a just or expedient basis for the levying of a tax or raising a revenue thereon.

The Constitution of the United States (§ 7 of article I) contains a provision on this subject similar to the one in the State constitution. It reads: "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills."

In speaking of this clause, Story, in his Commentaries on the Constitution (§ 880), says: "And, indeed, the history of the origin of the power, already suggested, abundantly proves that it has been confined to bills to levy taxes in the strict sense of the words, and has

not been understood to extend to bills for other purposes, which may incidentally create revenue."

By the law in force at the passage of the act of 1882 personal property, including debts secured by mortgage, was listed to the owner in the county where he lived, and real property in the county in which it was situated, and both were required to be assessed for taxation at their "true cash value." Or. Laws, p. 752.

By the act of 1882 this proceeding was so far changed that a mortgage on real property and the debt secured thereby is assessed and taxed to the owner thereof in the county in which the land lies, and is required to be valued at the full amount of such debt, unless the property is not, in the judgment of the assessor, worth so much, in which case it must be assessed at its "real cash value."

The bills allege that the mortgages of the several plaintiffs are assessed by the assessors in the several counties at the nominal value of the debts, while the lands therein are only assessed at one-third of their value, thereby causing said lands to pay only one-third of the taxes that they ought to pay, and said mortgages two-thirds more than they ought to pay, which is not uniform but unequal taxation.

Upon the strength of the case of Cummings *v.* National Bank, 101 U. S., 153, counsel for the plaintiffs insist that this discrimination against the plaintiffs' mortgages renders the assessment illegal.

In that case the officers charged with the valuation of property for taxation in Lucas county, where the bank was located, adopted a settled rule or system by which real and ordinary personal property was estimated at one-third of its value, and moneyed capital at three-fifths of its value, and the State board of equalization increased the valuation of the bank shares to their full value.

The bank paid one-third of the tax and brought suit in the United States circuit court against the treasurer to enjoin the collection of the remainder. On consideration of the case in the Supreme Court, where it was taken by appeal, Mr. Justice Miller said that "the bank had the same right, under the laws and constitution of Ohio, to be protected against unjust taxation that any citizen of the State has, and, by virtue of its organization under the act of Congress, it can go into the courts of the United States to assert that right."

The court held that the tax was illegal because the valuation of the property not only operated but was intended to operate unequally, in violation of the constitution of the State, which provided for the taxation of all property "by a uniform rule," "according to its true value in money," and for this reason, and not, as claimed by counsel for defendants, that the unequal assessment was in violation of the act of Congress relating to the taxation of the shares of the national banks, it granted the relief and allowed the injunction.

But counsel for the defendants also insist that these cases are not within the rule laid down in Cummings *v.* National Bank, because it does not appear that the unequal assessments here complained of were deliberately intended, and also that before the plaintiffs can have relief on that ground it must appear that there was some common design or fraudulent conspiracy among the assessors of these

various counties to make an unequal and illegal assessment to the prejudice of the plaintiffs.

But it is not necessary that there should be any actual conspiracy or expressed design to disregard the law in this respect on the part of the assessor to render an assessment illegal. Whenever the assessor of a district of a country as large as one of these counties uniformly estimates real property at only one-third of the value he places on mortgages it is impossible to attribute the result to the infirmity of human judgment, and the only conclusion possible in the premises is that it was deliberately and willfully done in pursuance of a settled purpose or rule on his part, and where the same thing occurs in a number of counties in various parts of the State it is manifest that the action of the assessors is not only willful and deliberate, but that it is the result of a general and well understood custom to substitute this conventional value of real property for "the true cash" one, which the statute requires.

Indeed, the practice is so universal and well known that the court might take judicial notice of it and safely assume that there is not an acre of land in Oregon that is valued for taxation at more than one-half its "true cash value," and that generally it is not valued at more than one-third of such value. Nor is it a sufficient answer to this to say, as counsel does, that land in Oregon does not yield an income of 6 per centum to its owners on its assessed value, for the annual income of land depends not alone or largely on its value, but its use and management.

Probably two-thirds of the taxable land in Oregon is unused, except as wild pasture. The owners of this property do not expect any income from it, nor are they entitled to any, but they are getting the benefit, year by year, of its enhancement in value from the general growth and improvement of the country, to which they often contribute but very little.

But it is not probable that the money of the country yields an income of more than six per centum. Certainly, if it is loaned at legal interest and pays the usual taxes, it does not. Then there is always a considerable portion of this capital lying idle, but still subject to taxation, and yet in the nature of things personal property, especially money, is more liable to escape taxation than land, and, therefore, it is that in a country governed largely by land-owners like Oregon there is more or less undervaluation of land upon the specious plea, more understood than expressed, that this is the only way to keep even with the money capital of the country and secure something like an equality of burdens between them.

But be this as it may the State scheme of taxation is not based on the income derived from property, but its "true cash value," and, therefore, it is useless to institute a comparison between the productiveness of land and money.

Upon this phase of the case I am inclined to think the plaintiffs are entitled to relief against two-thirds of this tax, for if the allegations in the bills are not sufficient as to the deliberation and uniformity with which the land was undervalued by the assessor there is no doubt but what they can be truthfully made so.

But one of the grounds of demurrer to these bills is that, so far as this phase of the case is concerned, the plaintiffs are not entitled to relief in these suits, because it does not appear that they have paid or tendered so much of the tax as it appears they ought to pay.

This objection is well taken. In State Railway Cases, 92 U. S., 617, the Supreme Court, in considering this question, say that before a party can maintain a suit to enjoin the collection of a tax he "must first pay what is conceded to be due, or what can be seen to be due, on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The State is not to be thus tied up as to that which there is no contest by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax it must be tendered, and tendered without the condition annexed of a receipt in full for all taxes assessed. * * * We lay it down with unanimity as a rule to govern the courts of the United States in their action in such cases." To the same effect is the ruling in National Bank *v.* Kimball, 103 U. S., 733, and in Huntington *v.* Palmer, 7 Saw., 335.

The assessment of the plaintiffs' mortgages for 1884 in Yam Hill county is made by the sheriff under § 3 of the old territorial act of January 26, 1855 (Or. Laws, p. 769, § 98), which authorized that officer to assess and collect a tax on any property which he might find had been omitted from the assessment-roll, there being
34 then no provision in the law for a board of equalization. It is suggested that this section was repealed by the act of October 25, 1870 (Ses. Laws, 52), constituting the county judge, clerk, and assessor a board of equalization, and the suggestion is not without force.

It is also maintained that this section is void under the Fourteenth Amendment, because it deprives the party affected by the assessment of his property without due process of law, in that it makes the fiat of the sheriff, without notice to the owner, sufficient evidence that his property has been omitted from the assessment-roll, and is of a certain value for the purpose of taxation, to which it is thereby made liable without any more to do.

Under the rule carefully laid down by the Supreme Court in Davidson *v.* New Orleans, 96 U. S., 104, I think this point is well taken. The listing and valuation of the property is done by the sheriff arbitrarily and without notice to the owner, and there is no provision for correcting his action in either respect, but the collection of the tax follows immediately upon such listing and valuation and by the sale of the property if necessary. Nor does § 4 of the same act (Or. Laws, p. 769, § 99), which authorizes the sheriff, upon application of the party interested, to correct certain errors of the assessor, apply to an assessment made by the sheriff under § 3, nor would it be sufficient to make it due process of law if it did. The party aggrieved would still be without notice of the proceeding until the tax was demanded or the property seized for non-payment thereof.

But this proceeding of the sheriff did not and does not excuse the plaintiffs from paying the proper tax on their mortgage in this county

for the year 1884. Generally it may be said that the levy and collection of a tax is a proceeding *in invitum*, to which the tax-payer is only passively a party; but when he becomes an actor in the matter, and seeks the aid of a court of equity to protect him against some threatened wrong in the premises, the situation is changed, and the rule applies—he who seeks equity must do equity—which in this case means that the plaintiffs must pay or offer to pay whatever they ought to have paid if they had been duly assessed in 1884 before they can invoke the aid of this court to enjoin the sheriff from collecting the tax upon this illegal assessment.

The motions for injunctions are disallowed and the demurrers sustained.

Mr. John W. Whalley, Mr. W. D. Fenton, Mr. Raleigh Scott, for plaintiffs, for whom also a written argument by Mr. Thomas M. Cooley was filed.

Mr. R. S. Strahan, Mr. John Burnett, Mr. A. H. Tanner, Mr. H. Hurley, and Mr. William B. Gilbert, for the several defendants.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: Filed July 13, 1885. R. H. Lamson, clerk.

35 And afterwards, to wit, on Wednesday, the 5th day of August, 1885, the same being the 51st judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

36 In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY
vs.
J. F. GROVES, Sheriff of Polk County; B. P. CORNELIUS, Sheriff of Washington County; Sol. King, Sheriff of Benton County; G. A. Taylor, Sheriff of Douglas County; J. R. Campbell, Sheriff of Lane County; William Martin, Sheriff of Umatilla County; J. K. Charlton, Sheriff of Linn County; E. B. Collard, Sheriff of Yam Hill County, and A. L. Saunders, Sheriff of Union County. } No. 1140.

AUGUST 5, 1885.

Now at this day come the defendants, by Mr. James F. Watson, of counsel, and move the court for an order dismissing the bill herein, and it appearing that an order was made herein on July 13, 1885, sustaining the demurrer to said bill, and that the complainant has failed to further plead within the time allowed it, it is therefore adjudged and decreed that the bill herein be, and the same is hereby, dismissed, and that the defendants do have and recover of and from

the complainant their costs and disbursements herein, taxed at $87.50, and that they have execution therefor.

(Signed) DEADY, J.

Endorsed: Filed and entered August 5, 1886. R. H. Lamson, clerk.

37 And afterwards, to wit, on the 13th day of August, 1885, there was duly filed in said court by defendants a cost bill in words and figures as follows, to wit:

38 In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY CO., Plaintiff, *vs.* J. F. GROVES *et al.*, Defendants. } No. 1140.

Statement of disbursements claimed in the above-entitled cause, viz:

Clerk's fees	$6 50
Marshal's fees	
Costs in lower court	
Advertising	
Depositions	
Attorney's fee	20 00
Attorney's fees for taking — depositions, at $2.50 each	
Master's fees	
Referee's fees	
Disbursements	
Witness' fees	
Cost of printing briefs	52 00
Total taxed at	$78 50

39 DISTRICT OF OREGON, *ss:*

I, James F. Watson, being duly sworn, say: I am one of the attorneys for defendant in the above-entitled cause; that the costs and disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that — is entitled to recover the same from the plaintiff.

JAMES F. WATSON.

Subscribed and sworn to before me this August 13, 1885.

R. H. LAMSON, *Clerk.*

[Endorsed:] In the — court of the United States for the district of Oregon. —— ——, plaintiff, *vs.* —— ——, defendants. Cost bill. Filed Aug. 13, 1885. R. H. Lamson, clerk.

39½ And afterwards, to wit, on the 18th day of September, 1886, there was duly filed in said court a bond on appeal in words and figures as follows, to wit:

40 In the Circuit Court of the United States for the District of Oregon.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY

vs.

J. F. GROVES, Sheriff of Polk County, Oregon, and Others.

Know all men by these presents that we, The New England Mortgage Security Co., complainant and principal, and Henry Failing, surety, are held and firmly bound unto J. F. Groves and others, defendants in this suit, in the sum of one thousand dollars, to be paid to the said defendants in this suit, their executors and administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 18th day of September, 1886.

Whereas the above-named complainant, The New England Mortgage Security Company, has appealed to the Supreme Court of the United States to reverse the decree in the above-entitled cause by the circuit court of the United States for the district of Oregon:

Now, therefore, the condition of this obligation is such that if the above-named complainant shall prosecute said appeal to effect and answer all costs adjudged against it if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE NEW ENGLAND MORTGAGE SECURITY COMPANY,
By J. C. MORELAND, *Its Attorney.* [L. S.]
HENRY FAILING. [L. S.]

Signed, sealed, and delivered in presence of—
W. Y. MASTERS.
R. H. LAMSON.

Witnesses to Henry Failing:
GEO. E. WITHINGTON.
W. Y. MASTERS.

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I, Henry Failing, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth, in property situated therein, the sum of two thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

HENRY FAILING.

Subscribed and sworn to before me this Sept. 18, 1886.

W. Y. MASTERS,
Notary Public for Oregon.

Approved Sept. 18, 1886.

DEADY, *J.*

Filed Sept. 18, 1886.

R. H. LAMSON, *Clerk.*

41 In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, certify that the foregoing is a true copy of the record and of all proceedings, including the opinion of the court, in the cause in equity entitled The New England Mortgage Security Company, complainant, *v.* J. F. Groves, sheriff of Polk county, Oregon, *et al.*, defendants, in said circuit court determined.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court, at Portland, in said district, this September 25, 1886.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON, *Clerk.*

Endorsed on cover: Oregon C. C. U. S. No. 1311. The New England Mortgage Security Company, appellant, *vs.* J. F. Groves, sheriff of Polk county, Oregon, *et al.* Filed December 16, 1886.